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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 39

PAUL WILLIAMS and LORENA WILLIAMS, husband and wife, *Petitioners*,

v.

HUGH LEE, doing business as GANADO TRADING POST.

On Writ of Certiorari to the Supreme Court of the State of Arizona

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's brief does not require any reply other than oral argument, but the brief of the United States as *amicus curiae* contains so many questionable propositions and is so fraught with potential injury to the Indian wards of the United States that it must be answered, even at some length.

I. The regulation declaring that a licensed Indian trader extends credit to Indians only at his own risk does not render the Indian's obligation unenforceable in a court of competent jurisdiction.

In our petition for certiorari (Pet. 10-12), we argued that the provision in what is now numbered 25 C. F. R. § 252.17 (Pet. Br. 29), entitled "Credit at trader's risk", to the effect that "A trader may extend credit to Indians, but such credit will be at the trader's own risk", rendered unenforceable any sale made by the trader on unsecured credit—there being regulations governing the taking of pawn or pledges, 25 C. F. R. § 252.16.

In the course of preparing petitioners' brief on the merits, we formulated the argument that this regulation must mean something more than the risk inherent in any sale on credit; for, of course, every retail merchant who permits customers to maintain charge accounts necessarily assumes a measure of commercial risk whenever he makes a sale other than for cash.

At this juncture, we discussed our views informally with members of the staff of the Solicitor for the Interior Department, who called to our attention the earlier form of this regulation (Pet. Br. 20), when it read, "Credit to Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians." They advised us, and we in turn pointed out to this Court (Pet. Br. 21), that the second clause of the foregoing sentence was deleted at the request of an association of Indian traders meeting at Gallup, N. M., in November 1933, on the view that the Government's Indian agents should at least use moral suasion to persuade Indians to meet their obligations. The text

of the traders' request is now set forth at U. S. Br. 2-3.

In view of this textual history, we considered untenable our earlier view that the regulation rendered judicially unenforceable the debts thus incurred by the Indians. We felt ourselves unable to contend that the single phrase, "at the trader's own risk", made the obligation such a nullity that it could not be sued upon in a court of competent jurisdiction, or that it was thereby placed on the plane of an illegal or usurious contract. Significantly enough, the traders themselves (U. S. Br. 3) spoke of "the collection of an honest debt."

We did not lightly abandon a contention (Question 2, Pet. 2) in respect of which this Court had granted certiorari. But after the Interior Department's lawyers had made us aware of the textual quicksand on which that contention rested, we simply could not conscientiously or properly press upon this Court an argument that, on its very face, was unsupportable.

The Solicitor General says (U. S. Br. 2), "we construe this provision as meaning that ordinary remedies for collection of debts—including judicial remedies—shall not be invoked within the reservation, and that traders must do business on that basis and understanding." That argument is broad enough to render the obligation unenforceable even if it were sued on in tribal courts (see 25 C. F. R., part 11). The Solicitor General, rather than support the strong substantive position of the Indians which we advocate—a position which he nowhere squarely opposes—seeks to avoid the entire issue by walking out on the quicksand of a

construction so untenable that we abandoned it because we could not in all conscience urge it upon this Court.

Our purpose, of course, is to win this case. But we are simply unable to read into the language of this regulation thus derived the meaning that the Solicitor General professes to find therein.

We are aware, of course, that it is generally sound judicial administration to decide cases narrowly, and that it is specifically the duty of this Court to avoid constitutional adjudication whenever litigation can be disposed of on non-constitutional grounds. But we do not believe that the basic jurisdictional question involved in the present case can be avoided by now inventing a tortured construction of the regulation.

II. Absent Congressional consent, a State court has no jurisdiction of a suit by a non-Indian against an Indian arising out of a transaction taking place on an Indian reservation.

We concluded a lengthy analysis of the authorities (Pet. Br. 8-17) supporting the proposition that state law is ineffective to reach Indians except insofar as Congress has specifically and expressly made them subject to such law by saying (Pet. Br. 17), "a State has jurisdiction over the territory of an Indian reservation within its boundaries—except in matters concerning Indians. Otherwise stated, jurisdiction over matters not concerning Indians is the extent of Arizona's jurisdiction within the Navajo Reservation."

The Government (U. S. Br. 6) cites *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P. 2d 456, which sustained the Indians' right to vote in Arizona, as an instance to the contrary. But just as an Indian's citizenship is irrelevant when considering his amenability to state

law (see cases cited at Pet. Br. 11), so his status as a voter or even as a state official is equally irrelevant. E.g., *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Rickert*, 188 U. S. 432, 445; *United States* v. *Nice*, 241 U. S. 591, 598.

Only Congress can render the Indians subject to state legislation and state jurisdiction; we have set forth (Pet. Br. 11-13) a number of recent instances where Congress has done so. Indeed, only at the last session, Congress permitted the Territory of Alaska to exercise civil and criminal jurisdiction over the Indians resident there (Act of August 8, 1958, Pub. L. 85-615, 72 Stat. 545). But, until Arizona complies with the requirements of the Act of August 15, 1953, c. 505, 67 Stat. 588 (Pet. Br. 28-29), its courts are not free to exercise civil jurisdiction over any Indians who reside on Indian Reservations within Arizona. See Pet. Br. 12-13, 14-15. To hold otherwise would permit a state to indulge in sporadic reaches of jurisdiction into the vast Navajo Reservation—about 24,000 square miles, as large as the entire State of West Virginia—without correlative extension of police, road, and other services which are concomitants of civil and criminal jurisdiction.

Earlier, as we have pointed out (Pet. Br. 13), a bill proposing to give the courts of Arizona concurrent jurisdiction over Indians in that state was vetoed by the President, and then repassed by Congress without the objectionable jurisdictional features. This course of dealing was given substantial weight by the court below when it held in 1950 that the Arizona courts had no divorce jurisdiction over two Navajo Indians resident on the Navajo Reservation who, after marriage pursuant to an Arizona license, had obtained a di-

vorce from the Navajo tribal court. *Begay* v. *Miller*, 70 Ariz. 380, 385, 222 P. 2d 624, 627-628; and see discussion in note 3, Pet. Br. 13-14. The decision of the Supreme Court of Arizona now under review, rendered in 1958, is, as we have heretofore indicated (Pet. Br. 13, 14, 18), utterly inconsistent with its 1950 decision in *Begay* v. *Miller*.

The Government, instead of joining wholeheartedly in the Indians' substantive attack on the later decision of the Supreme Court of Arizona, under review here, now seeks to minimize what that court found controlling in *Begay* v. *Miller*. The Solicitor General attempts somehow to avoid the significance of the veto and modification of the foregoing jurisdictional act by relegating his discussion thereof to a footnote (U. S. Br. 7, note 4), in which he speaks of "the reserved jurisdiction which the states already possessed", and of "pre-existing or reserved state power with respect to Indians." What "reserved jurisdiction"? What "pre-existing or reserved state power"?

Such expressions have a nostalgic pre-Appomattox flavor, but that is assuredly their only distinction. For under the Constitution, there is no reserved state power or jurisdiction over Indians, and there never has been, as anyone who troubles to read *Worcester* v. *Georgia*, 6 Pet. 515, will soon learn. Indeed, only this year both the court below as well as the Supreme Court of the neighboring State of New Mexico held that state courts had no criminal jurisdiction over Navajo Indians committing within the Navajo Reservation acts which if done by non-Indians would have violated the criminal laws of the states concerned. *Application of Denetclaw*, 83 Ariz. 299, 320 P. 2d 697; *State* v. *Begay*, 63

N. M. 409, 320 P. 2d 1017, certiorari denied, 357 U. S. 918.

We think that the governing principle was correctly set forth in Cohen, *Handbook of Federal Indian Law* (1941) 116, as follows:

> "That state laws have no force within the territory of an Indian tribe in matters affecting Indians is a general proposition that has not been successfully challenged, at least in the United States Supreme Court, since that Court decided, in *Worcester* v. *Georgia*, that the State of Georgia had no right to imprison a white man residing on an Indian reservation, with the consent of tribal and federal authorities, who refused to conform to state laws governing Indian affairs."

In the 1958 edition of *Federal Indian Law*, prepared by the Office of the Solicitor for the Interior Department, the foregoing passage has been significantly modified (p. 502):

> "From the beginning of our constitutional government, as we have heretofore indicated, Federal power has been interposed so that State laws generally have had little force within the territory of an Indian tribe in matters affecting Indians. This is a general proposition judicially adhered to by the United States Supreme Court since *Worcester* v. *Georgia* * * *."

How account for the change, between 1941 and 1958, from "no force" to "little force"? That change assuredly does not rest on any intervening decisions by this Court; to the contrary, the principles laid down on this point in Mr. Cohen's edition are supported by later rulings here. *Creek County* v. *Seber*, 318 U. S. 705; cf. *Tulee* v. *Washington*, 315 U. S. 681. Moreover,

Mr. Cohen's treatise was repeatedly cited in opinions of this Court in the interim,* and on the last occasion the author was referred to as "an acknowledged expert in Indian law." *Squire* v. *Capoeman*, 351 U. S. 1, 8-9.

It can easily be demonstrated that the change in the text of *Federal Indian Law* rests, not on any intervening change in the law, but on an intervening change in policy. The 1958 edition lets a large cat out of the bag by frankly stating (p. 501):

> "Present Federal policy calls for the termination of Federal supervision of affairs of Indian tribes desiring such termination, to the extent practicable and as soon as termination is feasible. Any discussion of the scope of State power over Indian affairs must take that policy, and measures taken to effectuate it, into consideration. Such discussion must take into consideration also the earlier policy of leaving Indians free from State jurisdiction and control which is deeply rooted in our Nation's history. However, until the policy of terminating Federal supervision is effectuated legislatively by Congress, neither the Indians nor a State legislature can withdraw an organized tribe from that supervision or control. State law does not apply to Indian affairs except so far as, and to the extent that, the United States gives or has given its consent."

We agree entirely with the last sentence of the quotation, which is hardly consistent with the Solicitor

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* E. g., *United States* v. *Santa Fe R. Co.*, 314 U. S. 339, 349; *Creek Nation* v. *United States*, 318 U. S. 629, 639; *Arenas* v. *United States*, 322 U. S. 419, 421; *Drummond* v. *United States*, 324 U. S. 316, 317-318; *United States* v. *Tillamooks*, 329 U. S. 40, 48, 53; *Oklahoma Tax Comm.* v. *Texas Co.*, 336 U. S. 342, 344, 355; *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 288.

General's newly generated concept of "reserved state power with respect to Indians" (U. S. Br. 7, note 4). We submit that the basic infirmity of the Government's arguments in this case is that they have paid too much attention to the present Federal policy and too little attention to the present Federal law. And inasmuch as the Solicitor General appears here on behalf of the United States, petitioners' guardian, we can only conclude by regretfully repeating the classic query, *Quis custodiet ipsos custodes*—who shall guard the guardians themselves?

CONCLUSION

For the foregoing additional reasons, the judgment below should be reversed on the ground that the Arizona courts had no jurisdiction to entertain the proceeding.

Respectfully submitted.

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